

No. 87-1508

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In The  
**Supreme Court of the United States**  
October Term, 1987

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BEAN DREDGING CORPORATION,

*Petitioner,*

vs.

MARTHA B. OLSEN, COMMISSIONER OF REVENUE  
OF THE STATE OF TENNESSEE,*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF TENNESSEE WEST-  
ERN GRAND DIVISION AT JACKSON

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PETITIONER'S REPLY BRIEF

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**PETITIONER'S REPLY BRIEF**

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Petitioner, Bean Dredging Corporation, hereby responds to the Brief In Opposition to Petition for Writ of Certiorari filed on behalf of Respondent, Martha B. Olsen, Commissioner of Revenue of the State of Tennessee.

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## ARGUMENT

### **PETITIONER TIMELY RAISED THE COMMERCE CLAUSE ISSUE BEFORE THE TENNESSEE STATE COURTS AND THIS COURT HAS JURISDICTION OF THE ISSUE.**

This Honorable Court has jurisdiction of the Commerce Clause issue more fully set forth in the Petition for Writ of Certiorari under 28 U.S.C. § 1257. The erroneous characterization of Petitioner's dredging activities as inherently "local" by the Tennessee Supreme Court, coupled with Respondent's out-of-context quotation and characterization of certain comments by Petitioner's trial counsel as a "waiver" of Petitioner's constitutional rights under the Commerce Clause is an effort to circumvent the jurisdiction of this Honorable Court to the prejudice of Petitioner's constitutional rights for the following reasons.

#### **I. Petitioner Specifically Pled the Commerce Clause.**

Petitioner's original Complaint for refund of taxes is based upon two alternative theories. First, the use tax is inapplicable to Petitioner based upon the clear and unequivocal wording of Tennessee law, more particularly Tenn. Code Ann. § 67-6-321 (formerly Tenn. Code Ann. § 67-3012) and the holding of *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W. 2d 28 (Tenn. 1976), regardless of federal constitutional principles. Second, and alternatively, imposition of the use tax on Petitioner would violate the Commerce Clause of the United States Constitution. Petitioner specifically pled this alternative

argument and directly invoked the protection of the Commerce Clause in its original Complaint as follows:

12. Pursuant to TCA § 67-3012(8)(a) which specifically exempts the use of vessels or barges of fifty tons and more displacement so long as they are being used in interstate commerce, vessels used by Plaintiff in excess of fifty tons displacement are exempt from taxation and any imposition of use taxes on these vessels is erroneous, illegal and void.
13. The imposition of use taxes by the State of Tennessee on dredging vessels used in interstate commerce within and without this State is an unconstitutional encroachment on the power of the Congress of the United States to regulate commerce among the several states under Article I, Section 8 of the United States Constitution.

See Appendix 80, Par. 12 and 13, to Petitioner's Petition for Writ of Certiorari.

In each case cited by Respondent for the proposition that this Honorable Court has no jurisdiction over the Commerce Clause issue, every aggrieved party alleging violation of constitutional rights either failed to invoke the Constitution in its pleadings or raised a new and different constitutional argument for the first time in the Petition for Writ of Certiorari. Only *Tacon v. Arizona*, 410 U.S. 351, 35 L.Ed 2d 346, 93 S. Ct. 998 (1973) purports to involve a waiver of previously pleaded constitutional rights. In fact, a close reading of *Tacon* reveals that the case does not involve the waiver of a constitutional right at all. Rather, petitioner in *Tacon* pleaded at trial that no waiver occurred under Arizona's Rules of Criminal Procedure. Petitioner in

*Tacon* invoked its federal right to confrontation under the Sixth and Fourteenth Amendments for the first time before this Honorable Court.

Petitioner, Bean Dredging Corporation, specifically pleaded and invoked the protection of the Commerce Clause in its original Complaint.

## II. The Tennessee Tax Statute is Constitutional on its Face.

Petitioner's trial counsel only conceded that the Tennessee Tax Statute, *on its face*, does not attempt to extend the State's taxing powers beyond the parameters permitted by the Commerce Clause. The Statute, *on its face*, does not tax vessels and barges of 50 tons or over of displacement purchased for use in interstate commerce or for use outside the State of Tennessee so long as such vessels are being used in interstate commerce:

67-6-321. *Railroad stock - vessels and barges.* - There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the State of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce. (Formerly Tenn. Code Ann. § 67-3012).

See Appendix 217 to Petitioner's Petition for Writ of Certiorari.

Obviously, if the State of Tennessee does not tax vessels of fifty tons of displacement or over while in

interstate commerce, the statute on its face cannot violate the Commerce Clause. Comments of Petitioner's trial counsel were merely an effort to clarify the issues for Chancellor Allisandratos. When taken in its full context, the comments of Petitioner's trial attorney were not a waiver of Petitioner's constitutional rights, but rather an assertion that the tax, as applied to Petitioner, could be ruled illegal as a matter of Tennessee statutory law and the only prior interpretation of those laws in the maritime industry as set forth in *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976), whether or not the statute was constitutional on its face. Waiver of constitutional rights is never treated cavalierly, and this Court indulges every presumption against such a waiver. *Ohio Bell Tel. Co. v. Commissioner*, 301 U.S. 292, 81 L.Ed. 1093, 57 S. Ct. 724 (1937).

### III. The Trial Court Ruled for Petitioner Based on Tennessee Law.

Chancellor Allisandratos ruled the Tennessee use tax inapplicable to the facts of this case under Tennessee law:

This Court is of the opinion that while it is helpful to have the thoughtful analysis of sister states and their opinions from their courts that this Court must look first to the law as set out by the courts of Tennessee. This Court, therefore, relies heavily upon the *Herbert & Sons versus Woods* case that has been cited by both parties.

In reviewing the facts of this case and the facts of that case I find that the plaintiffs in this cause were engaged in interstate commerce. I find that

the entire scope of their activity was for the furtherance of preserving the navigation of the entire waterways, and I see no distinction between that and one who would avail themselves of those waterways simply for the purpose of transporting either goods or services across them.

With regard to the argument propounded by the Commissioner as it relates to storage, this Court does not believe that the statute contemplates the facts as in this case. Again relying on the Herbert case, I would point out that indeed in this case the only reason I find that this vessel was not actually docked in Tennessee is because there was no dock suitable enough for it to be docked. It created a man-made dock. For all practical purposes, it was docked. But it was not here in the capacity of storage as within the meaning of the statute I do not believe. It was here temporarily. And while that temporary time may have at times seemed somewhat frequent, it was only as a result of the condition of the river the vast majority of the time that it caused it to remain in its man-made dock. I see that as no different than the Herbert case.

The primary mission of the plaintiffs in this case and the purpose was to conduct interstate activity and its contacts with Tennessee were only for the purpose of the furtherance of that activity. Therefore, I will grant judgment in favor of the plaintiffs, costs to be assessed against the defendants.

See Appendix 38 and 39 to Petitioner's Petition for Writ of Certiorari.

Chancellor Allisandratos properly ruled the tax inapplicable based upon Tennessee law and did not refer to the Commerce Clause for it was entirely unnecessary, even though timely pleaded by Petitioner. The scope of Respondent's appeal to the Tennessee Supreme Court was likewise confined to a review of Chancellor

Allisandratos's findings of fact and conclusions of law. The Commerce Clause was neither briefed nor argued in the Tennessee Supreme Court because the issue at that point was focused on Tennessee law. The cases cited by Respondent in its Brief in Opposition to the Petition for Writ of Certiorari involved lower court judgments adverse to the applicants for certiorari followed by a subsequent failure by those parties to raise federal constitutional issues and protections before the highest state court in the appeal process.

Clearly, Petitioner had no need to raise these constitutional issues before the Tennessee Supreme Court because the decision of the trial court was based solely upon the interpretation and application of the Tennessee Statute in the light of *Herbert*. Nevertheless, the application of the Commerce Clause raised by Petitioner in its Complaint remained a viable alternative argument against the unconstitutional application of a statute which was constitutional on its face. Petitioner should not be prejudiced now for maintaining proper judicial economy before the Supreme Court of Tennessee.

**IV. The Tennessee Tax Statute As Interpreted By the Tennessee Supreme Court and Enforced by Respondent in This Case Violates Petitioner's Rights Under the Commerce Clause.**

It is well established that this Court has jurisdiction to review an interpretation of State law by a state's highest court where the state court decision rests on an incorrect perception of an interrelated federal law. In

this case the Tennessee Supreme Court's erroneous characterization of Petitioner's dredging activities as inherently "local" incorrectly places the activity outside the federal definition of interstate commerce as protected by the Commerce Clause. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 81 L.Ed. 2d 113, 104 S. Ct. 2267 (1984).

Only when the Tennessee Supreme Court rendered its Judgment against Petitioner did the Tennessee Tax Statute become unconstitutional *in operation*, albeit constitutional *on its face*.

The facts of the instant case are indistinguishable from *Herbert* except that the State of Tennessee taxes Louisiana businesses coming into the state but absolves Tennessee residents from the tax in a patently discriminatory manner in violation of three of the four principles of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed. 2d 326, 97 S. Ct. 1076 (1977), all as more fully set forth in the Petition for Writ of Certiorari.

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## CONCLUSION

Under the facts and circumstances of this case, Petitioner has preserved its rights under the Commerce Clause of the United States Constitution and the jurisdiction of this Honorable Court. The Tennessee use tax as applied to the Petitioner under the facts of this case and as enforced by Respondent violates the Commerce Clause.

For the foregoing reasons, as well as those which have been urged in the Petition, a Writ of Certiorari should be granted.

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